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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY,
THE LEGAL INTELLIGENCER and
THE PENNSYLVANIA LAW WEEKLY,
Petitioners,

v.

JANE DOE, C.A.R.S PROTECTION PLUS, INC.
and FRED KOHL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 9, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Third Circuit's blanket sealing of an entire case, including its very existence, is facially and/or presumptively unconstitutional under the First Amendment.

2. Whether the Third Circuit's blanket sealing of an entire case—dockets, judicial records and judicial proceedings—is contrary to this Court's precedents and decisions of other circuit courts of appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

3. Whether the Third Circuit erred and disregarded this Court's precedents by failing to require that both the trial and appellate court give the general public and press notice and the opportunity to be heard before sealing judicial records and closing court proceedings, and by failing to require an articulation of specific, on-the-record findings for each record and each proceeding that there is an "overriding interest" justifying closure and that no less restrictive alternatives exist.

4. Whether the Third Circuit erred and disregarded this Court's precedents when it refused to allow Petitioners to intervene in the proceedings below for the limited purpose of asserting their rights of access to judicial records and proceedings under the First Amendment and common law.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner The New York Law Publishing Company is not a publicly held company, and no publicly held entity owns 10% or more of Petitioner's stock. Petitioners Legal Intelligencer and the Pennsylvania Law Weekly are newspapers owned by The New York Law Publishing Company.

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IN THE

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v.

JANE DOE, C.A.R.S PROTECTION PLUS, INC.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The Order of the United States Court of Appeal for the Third Circuit, dated June 19, 2008, which denied Petitioners' petition and motions for intervention and access to judicial records and proceedings, is included in the Appendix at Exhibit A.

Also included in the Appendix (at Exhibit B) is the decision of the United States Court of Appeal for the Third Circuit, dated May 30, 2008, which affirmed the decision of the United States District Court for the Western District of Pennsylvania to seal the entire case, including the dockets.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit was entered on June 19, 2008. The jurisdiction of this Court rests upon 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

STATEMENT OF THE CASE

On May 30, 2008, the United States Court of Appeals for the Third Circuit filed a "precedential" decision. The decision was the first sign of the existence of a case that had been completely sealed, including the docket sheets, for seven years. The decision reversed the United States District Court for the Western District of Pennsylvania's granting of summary judgment in favor of the respondents/ defendants C.A.R.S Protection Plus, Inc. and Fred Kohl. In one paragraph, the Third Circuit also affirmed the District Court's sealing of the entire case, ruling that it was not an abuse of discretion even though the public and press was not given notice and opportunity to be heard, and no on-the-record findings supporting closure were made.

According to the Third Circuit's decision, this is an employment discrimination lawsuit brought under Title VII, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), by Jane Doe, who

alleged that her employer, respondent/defendant C.A.R.S Protection Plus, discriminated against her because she exercised her constitutional right to have an abortion. *See* Appendix A.

Until the Third Circuit's May 30, 2008 decision, however, the civil rights/employment discrimination lawsuit was completely sealed from public view. All proceedings were closed. All judicial records were sealed. Even the docket was sealed. As far as the public knew, the case did not exist. To this date, the only information available to the public about this seven-year old case is contained in the Third Circuit's May 30, 2008 decision.

Thus, for example, if a member of the public or press, using the PACER system, enters the number for the case in the District Court, PACER issues a report saying "This case is SEALED." No information about the case is given, not even the parties or type of case. Of course, no member of the public or press would have been able to do so, because, until the Third Circuit's decision, the case number was unknown. Or if one gives the name of the parties in this case—for example, respondent/defendant Fred Kohl—PACER issues a report saying: "Sorry, no person found." Similarly, if one uses PACER to access the Third Circuit's dockets and enters the case numbers for the appeals, PACER issues a report that says: "Case under seal." Or if one gives PACER the name of the parties in this case ("Fred Kohl"), PACER issues a report saying: "No case found with the search criteria." Thus, both courts' sealing of this case is comprehensive. For seven years, this case was invisible, and the only publicly-available information about the case remains the Third Circuit's May 30, 2008 decision.

Thirteen days after the Third Circuit revealed this case's existence in its May 30, 2008 decision, Petitioners, on June 12, 2008, timely filed two motions and one petition with the Third Circuit:

1. Emergency Motion For Intervention For The Limited Purpose of Seeking Access To Judicial Records and Proceedings;
2. Emergency Petition For Rehearing With Suggestion For Rehearing In Banc; and
3. Emergency Motion To Obtain Access To All Judicial Records And Proceedings, Including Dockets.

On June 19, 2008, before any party had responded to the motions and petition, the Third Circuit issued an Order denying Petitioners' motions and petition. *See* Appendix B. Thus, the Third Circuit refused to unseal the docket, judicial records and proceedings in the Third Circuit. And the Third Circuit refused to reconsider its May 30, 2008 decision affirming the District Court's sealing of the docket and all judicial records and proceedings in the underlying case.[1]

As a result, this entire case, at both the District Court and Third Circuit levels, remains completely sealed with the only exception of the Third Circuit's May 30, 2008 Decision and June 19, 2008 Order.

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[1] The Third Circuit's suggestion that Petitioners "pursue this matter with the District Court upon remand" makes no sense since the Third Circuit itself sealed the records and proceedings on appeal, including its own docket. The District Court, of course, has no power to order the Third Circuit to unseal its own records and proceedings. Moreover, since the Third Circuit's May 30, 2008 decision specifically sanctioned the District Court's sealing, it would be futile to ask the District Court to reverse an action the Third Circuit expressly upheld.

Petitioners understand that the respondents are also subject to a gag order preventing them from talking about the case.

As the Third Circuit's May 30, 2008 decision reveals, the District Court permitted respondent/plaintiff Jane Doe to proceed in the lawsuit using a pseudonym. Respondents/defendants C.A.R.S and Kohl challenged that ruling on appeal to the Third Circuit, which held in its May 30, 2008 decision that the District Court did not abuse its discretion in granting respondent Jane Doe's motion to proceed anonymously. Petitioners do not object to respondent/plaintiff Jane Doe's anonymity, and that is not an issue for this Court to address. Nor do Petitioners object to the redaction of information from court records and proceedings that would reveal the identity of respondent/plaintiff Jane Doe.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION UPHOLDING THE COMPLETE SEALING OF THE CASE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD, WITHOUT ARTICULATED, ON-THE-RECORD FINDINGS AND INDIVIDUALIZED DETERMINATIONS AND WITHOUT PERMITTING PETITIONERS TO INTERVENE RAISES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

A. The First Amendment and Common Law Right of Access

This Court has ruled that there is a common law and First Amendment right of public access to criminal cases. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). This Court has likewise recognized a common law right of access to judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

While this Court has not directly addressed the issue of access to civil proceedings, it has noted that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980); *see also Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). Indeed, this Court has observed that "in some civil cases the public interest in access . . . may be as strong as, or stronger than, most criminal cases" *Gannett v. DePasquale*, 443 U.S. 368, 387 n.15 (1979). Federal appellate courts have uni-

formly applied the right to access to civil proceedings. *See, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

This right of access to judicial records and proceedings serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press Enterprise I*); *Globe Newspaper*, 457 U.S. at 606. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Because of the importance of this right, closure must be "rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I* at 509.

B. The Third Circuit's Decision Conflicts with This Court's Jurisprudence

The Third Circuit's rulings violated this right of access in numerous fundamental ways.

First, this Court has held that before access can be denied, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25. In this case, the Third Circuit affirmed the District Court's sealing of the entire case without any notice and opportunity to be heard. And the Third Circuit sealed its own docket, records and proceedings (with but two exceptions, as described

above) without providing notice and opportunity to be heard. For a period of seven years, this case was completely secret, the public and press not even aware of the denial of their rights established by this Court and thereby unable to assert their rights of access to a case involving fundamental constitutional issues. These rulings of the Third Circuit and District Court directly conflict with this Court's decisions.

Second, this Court has held that if access is denied, a court must articulate detailed, on-the-record "findings" that there is an "overriding interest" justifying closure and that no less restrictive alternatives exist. *See Richmond Newspapers,* 448 U.S. at 581.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise I, 464 U.S. at 824 (holding that "not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure").

Here, the Third Circuit affirmed the District Court's complete sealing of the lawsuit even though the trial court never made any on-the-record articulation of findings that justified closure. Moreover, the Third Circuit sealed its own dockets, records and proceedings (with but two exceptions) without articulating on the record its findings justifying closure. As a result, the public and press

were never informed why the lower courts sealed all judicial records and proceedings in this case. Nor have the lower courts explained why they sealed the case or how they conducted the required analysis under the First Amendment and common law before denying such access. These failures directly conflict with the decisions of this Court.

Third, this Court has strongly suggested if not held that "individualized determinations are *always* required before the right of access may be denied." *Globe Newspaper*, 457 U.S. at 608 n.20 (invalidating state statute providing for the exclusion of the public and press from trials of specified sexual offenses) (*citing Richmond Newspapers*, 448 U.S. at 581) (emphasis added). In other words, blanket closure orders are unconstitutional absent individualized determinations justifying closure for each record and proceeding.

Here, the Third Circuit affirmed the District Court's blanket sealing of an entire case, even the very existence of the case, without any "individualized determinations" that closure of each record and proceeding was justified by a compelling interest for which there were no less restrictive alternatives. Moreover, the Third Circuit sealed its own dockets, records and proceedings without any "individualized determinations" required by this Court. Thus, these rulings of the Third Circuit and District Court directly conflict with this Court's decisions.

Lastly, in giving the public and press the right to notice and opportunity to be heard prior to any closure, this Court has implicitly required that courts must permit members of the public and press to intervene for the limited purpose of seeking access to judicial records and proceedings. Here, the Third

Circuit, without any explanation, denied Petitioners' motion to intervene for the limited purpose of seeking access, thereby denying Petitioners the opportunity to be heard. That denial is inconsistent with the decisions of this Court.

For these four reasons, the Third Circuit's decision directly contradicts established precedent of this Court. Accordingly, Petitioners respectfully request that this Court grant certiorari and hear this appeal.

II. THE THIRD CIRCUIT'S DECISION SEALING ITS AND THE DISTRICT COURT'S DOCKETS CONFLICTS WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER

The Third Circuit not only affirmed the District Court's complete sealing of the case docket but also has sealed its own appellate docket. By thus sealing the dockets, the lower courts effectively rendered the case a secret case, unknown and unknowable to anyone other than the parties to the lawsuit. The first time the general public and press became aware of the lawsuit was when the Third Circuit issued its May 30, 2008 decision that reversed the District Court's granting of defendant's motion for summary judgment and affirmed the District Court's sealing of the case. That first revelation of the case's existence came nearly seven years after the case was filed in 2001.

While the Third Circuit's decision blessed secret cases and dockets, other Circuit Courts have found them facially unconstitutional. The Eleventh Circuit was the first circuit court to address this issue. In *United States v. Valenti*, 987 F.2d 708 (11th Cir.

1993), *cert. den. sub nom., Times Pub. Co. v. U.S. District Court for the Middle District of Florida*, 510 U.S. 907 (1993), the Eleventh Circuit held that a "dual-docketing system" or "sealed docket" in the Middle District of Florida "completely hid from public view the occurrence" of various closed proceedings and filings. *Id.* at 715. It held that this secrecy violated the public's and press' First Amendment right of access and declared it facially unconstitutional, finding that secret dockets are "inconsistent with affording the various interests of the public and the press meaningful access" to judicial records and proceedings. *Id.*

Despite the Eleventh's Circuit ruling, the Southern District of Florida continued to seal dockets in certain criminal cases. Although that district court unsealed the dockets in one criminal case, the Eleventh Circuit nonetheless rebuked the district court, reminding it that "it cannot employ secret docketing procedures that we[re] explicitly found unconstitutional in *Valenti*". *United States v. Fabio Ochoa-Vasquez*, 428 F.3d 1015, 1028 (11th Cir. 2005) (finding that the district court violated the First Amendment right of access by "ordering the clerk of court to keep records sealed, and directing that they be held in the vault and not docketed").

More recently, in *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), the Second Circuit held that the public and press have a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings." *Id.* at 91. The Second Circuit found that

> [T]he ability of the public and press to attend civil and criminal cases would be merely theo-

> retical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment . . . . Sealed docket sheets would also frustrate the ability of the press and the public to inspect those documents, such as transcripts, that we have held presumptively open. Finally, the inaccessibility of docket sheets may thwart appellate or collateral review of the underlying sealing decisions. Without open docket sheets, a reviewing court cannot ascertain whether judicial sealing orders exist.

Id. at 94. Analyzing the "logic" and "experience" prongs of the test set forth in *Press-Enterprise I*, the Second Circuit found that there was a longstanding historical openness for docket sheets, and openness "enhances both . . . basic fairness . . . and the appearance of fairness so essential to public confidence in the system." *Id.* at 94 (*quoting Press-Enterprise I*, 464 U.S. at 508). As a result, the Second Circuit held that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them." *Id.* at 97; *see also In re State-Record Company, Inc.*, 917 F.2d 124, 129 (4th Cir. 1990) (holding that an order sealing docket sheets violated the public's First Amendment rights, and noting "we can not understand how the docket entry sheet could be prejudicial").[2]

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[2] *See also Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (holding that motions to seal plea agreements must be publicly docketed); *Globe Newspaper Co. v. Fenton*, 819

The right to docket sheets is the basic pre-condition for the public's exercise of its right of access to the courts. Without it, the right of access established by this Court would be meaningless. The Third Circuit's decision denying access to the docket in this case conflicts with the decisions of other Circuit Courts of Appeal. Accordingly, Petitioner respectfully requests that this Court grant certiorari and hear this appeal.[3]

III. THE THIRD CIRCUIT'S DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The Third Circuit's decision is truly extraordinary. It permitted the wholesale sealing of an entire case. The public knew nothing of the case's existence for nearly seven years. If the public or press asked these courts whether there was a case brought by respondent Jane Doe against respondent C.A.R.S, they would have been told that no such case existed. Nothing about this case was available. Such secrecy

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F. Supp. 89 (D. Mass. 1993) (declaring Massachusetts' law denying access to court-maintained alphabetized indexes of defendants in closed criminal cases to be violative of the First Amendment).

[3] Again, Petitioners do not object to the redaction of information from court records and proceedings that would reveal the identity of respondent/plaintiff Jane Doe. Thus, Petitioners are not seeking access to court dockets (or to any other judicial record or proceeding) to the extent that they would reveal Jane Doe's identity.

seems impossible in our country, yet it happened here, and was approved by the Third Circuit in one paragraph.

Not only did the Third Circuit deny the public and press access to this lawsuit, it also denied Petitioners even the right to intervene for the purpose of seeking access. For the Third Circuit, notice and the opportunity to be heard mean nothing when it decides to hide the existence of lawsuits. In so ruling, the Third Circuit apparently believes that there are no rights of access implicated by its decision.

This is no run-of-the-mill lawsuit. It raises the question of whether it is legally permissible for an employer to punish a woman's exercise of her constitutional right to terminate her pregnancy. In publicly issuing a "precedential" opinion, the Third Circuit itself thought this case important. Yet here an entire case, at both the trial and appellate levels, was completely sealed, and neither the Third Circuit nor the District Court thought it necessary to tell anyone about the sealing and thereby give the public and press the chance to object.

This Court has repeatedly affirmed the value of openness. For example, access:

- promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system
- serves an important "educative" interest
- gives the assurance that the proceedings were conducted fairly to all concerned and "promotes confidence in the fair administration of justice"

- has a significant community therapeutic value because it provides an "outlet for community concern, hostility, and emotion"
- serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality
- enhances the performances of all involved.

Richmond Newspapers, 448 U.S. at 569-72, 584, 596-97. By denying access to the dockets, all proceedings and all but two judicial records in a seven-year-old civil case raising important constitutional questions, the Third Circuit undermined and disregarded every one of these important public policies supporting access.

The secrecy of this case prompts numerous troubling questions. How many other cases are completely sealed? Is there a parallel justice system at work here, visible and accountable to no one? The possibility that there are many other sealed cases raises deeply disturbing questions about the integrity and legitimacy of our legal system. This is no idle fear, as there have been a number of recent revelations where courts have permitted cases to proceed in complete secrecy, even despite circuit court opinions prohibiting the practice.[4]

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[4] In 2006, the Reporters Committee for Freedom of the Press published a study showing that as many as 18% of criminal cases filed in D.C. federal courts were missing or "undocketed." In Connecticut, a 40-year old secret docketing system was so hidden that even the chief justice was unaware of its existence. More information about the unfortunate prevalence of secret dockets is available at http://www.rcfp.org/secretjustice/

It is vitally important that this Court act to reassure the public that the courts are transparent, operate efficiently and fairly, and dispense justice to all. Despite the rulings by some circuit courts requiring access to dockets, district courts continue to seal dockets and hide the existence of lawsuits. The only way to remedy such violations of the First Amendment is for this Court to grant cert, reverse the Third Circuit's decision, and issue an opinion that unambiguously tells federal courts that secret cases and dockets are flatly unconstitutional. Failure to do so would sanction the Third Circuit's conduct and embolden other federal courts to do the same.

Accordingly, the Petition should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 9, 2008

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secretdockets/pg1.html. *See generally* Meliah Thomas, "The First Amendment Right of Access to Docket Sheets," 94 Cal. L. Rev. 1537 (2006).

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 30, 2008]

Nos. 06-3625, 06-4508

JANE DOE, Appellant at No. 06-3625,

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL,

JANE DOE,

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL, C.A.R.S Protection Plus, Inc., Appellant at No. 06-4508.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 01-cv-02352)
District Judge: The Honorable Maurice B. Cohill, Jr.

ARGUED OCTOBER 31, 2007

BEFORE: RENDELL and NYGAARD, *Circuit Judges* and McCLURE, * *District Judge*.

---

* Honorable James F. McClure, Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Jane Doe sued her former employer, C.A.R.S. Protection Plus, Inc. (CARS), alleging employment discrimination based on gender, in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*. The District Court granted the employer's motion for summary judgment, finding that Doe had failed to establish a *prima facie* case of discrimination. We will reverse.

I.

We exercise plenary review over the District Court's grant of summary judgment and apply the same standard, *i.e.*, whether there are any genuine issues of material fact such that a reasonable jury could return a verdict for the plaintiff. FED. R. CIV. P. 56(c); *Debiec v. Cabot Corp.*, 352 F.3d 117, 128 n. 3 (3d Cir. 2003) (citation omitted). We view the facts of this case in the light most favorable to the nonmoving party and draw all inferences in that party's favor. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

In an employment discrimination case, the burden of persuasion on summary judgment remains unalterably with the employer as movant. The employer must persuade us that even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to the plaintiff, no reasonable jury could find in the plaintiff's favor. *See Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200, 201-02 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988).

A.

CARS does business in several states insuring used cars. CARS hired Jane Doe as a graphic artist in June 1999. Doe's sister-in-law, Leona Dunnett, was the CARS office manager. Fred Kohl, Vice-President and part-owner of the company, was Doe's supervisor. In May of 2000, Doe learned that she was pregnant. When she told Kohl she was pregnant, she asked Kohl about making up any time missed for doctor's appointments. Kohl told Doe they would "play it by ear."

On Monday, August 7, 2000, Doe's doctor telephoned her at work to inform her that problems were detected in her recent blood test and that further tests were necessary. An amniocentesis test was scheduled for the next day. Kohl was not in the office on August 7, 2000, so Doe told Leona Dunnett and Alivia Babich (who was Kohl's personal secretary), that she needed to be off work on Tuesday, August 8, 2000. Babich notified Kohl that Doe would be absent.

The amniocentesis test was not performed on the 8th, but a sonogram was, and additional tests were scheduled for the following day. Doe's husband telephoned Kohl and informed him that there were

problems with the pregnancy and that the test would be performed on August 9th. Kohl approved the absence and said to contact him the next day.

On Wednesday, August 9th, Doe learned that her baby had severe deformities and her physician recommended that her pregnancy be terminated. That afternoon, Doe's husband again telephoned Kohl and told him that Doe would not be at work the next day. Kohl approved the absence and asked that Doe's husband call him the following day.

Doe had an additional doctor's appointment on Thursday, August 10th. Doe's husband testified that he called CARS again on that Thursday, and first spoke to Leona Dunnett. Then, he spoke with Kohl and told him that the pregnancy would be terminated the following day. Doe's husband requested that she be permitted to take one week of vacation the following week. According to Doe's husband's testimony, Kohl approved the request for a one-week vacation. Her pregnancy was terminated on Friday, August 11, 2000. Neither Doe nor her husband called Kohl over the weekend of August 12th.

A funeral was arranged for Doe's baby on Wednesday, August 16th. Kohl gave Leona Dunnett (the baby's aunt) permission to take one hour off work to attend the funeral. As she was leaving for the funeral, Leona noticed Babich packing up Doe's personal belongings from her desk. After the funeral, Leona told Doe what she had seen. Doe called Kohl who told her that she had been discharged.

After Doe was discharged from her employment at CARS, she filed a timely charge with the EEOC and was issued a right-to-sue letter. Doe filed this lawsuit, alleging employment discrimination based on

gender, a violation of Title VII, as amended by the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k). Doe maintained that CARS terminated her employment because she underwent a surgical abortion.

We note at the outset that Doe does not assert a typical pregnancy discrimination claim. She does not claim, for example, that she was discriminated against because she was pregnant or that she had been fired while on maternity leave. Instead, she argues that she was discharged because she underwent a surgical abortion. Whether the protections generally afforded pregnant women under the PDA also extend to women who have elected to terminate their pregnancies is a question of first impression in this Circuit.

II.

A.

The PDA makes it an "unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a); *see also Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware*, 450 F.3d 130 (3d Cir. 2006). In *CurayCramer*, the Appellant argued that Title VII's opposition clause protects any employee who has had an abortion, who contemplates having an abortion, or who supports the rights of women who do so. *Id.* at 134. Although we did not directly address the question in that case, we pointed to a decision of the Court of Appeals for the Sixth Circuit with approval:

> We note that the Sixth Circuit Court of Appeals has held that "an employer may not discriminate

> against a woman employee because 'she has exercised her right to have an abortion.'" *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir.1996) (quoting H.R. REP. NO. 95-1786 (1978) (Conf.Rep.), reprinted in 1978 U.S.C.C.A.N. 4749, 4765-66). Extending that principle, the Sixth Circuit further held that an employer "cannot take adverse employment action against a female employee for merely thinking about what she has a right to do." *Id.* Likewise, the Equal Employment Opportunity Commission (EEOC) has taken the position that it is an unlawful employment practice to fire a woman "because she is pregnant or has had an abortion." 29 C.F.R. pt. 1604, App. (1986).

Id. at 134 n.2.

> The PDA states that the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 200e(k). The EEOC guidelines interpreting this section, to which we give a high degree of deference under *Griggs v. Duke Power*, 401 U.S. 424, 433-34 (1971), expressly state that an abortion is covered by Title VII:

> The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and

> employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired . . . merely because she is pregnant or has had an abortion.

Appendix 29 C.F.R. pt. 1604 App. (1986). Similarly, the legislative history of section 2000e(k) provides the following guidance:

> Because [the PDA] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.

H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766. Clearly, the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion. We now hold that the term "related medical conditions" includes an abortion.

B.

We turn now to Doe's pregnancy discrimination claims. As earlier noted, Title VII prohibits employment discrimination based on an individual's sex. 42 U.S.C. § 2000e-2(a). The prohibition is breached "wherever an employee's pregnancy [or related medical condition] is a motivating factor for the employer's adverse employment decision." *In re: Carnegie Ctr. Assoc.*, 129 F.3d 290, 294 (3d Cir. 1997). The PDA does not, however, require preferential treatment for

pregnant employees. Instead, it mandates that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work. *Id.* at 297; *see also Tysinger v. Police Dept. City of Zanesville*, 463 F.3d 569, 575 (6th Cir. 2006).

Disparate treatment discrimination is proven by either using direct evidence of intent to discriminate or using indirect evidence from which a court could infer intent to discriminate. Doe supports her claim with evidence from which discrimination may be inferred. We therefore use the familiar *McDonnell Douglas* burden-shifting framework to analyze her Title VII pregnancy discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under this analysis, the employee must first establish a *prima facie* case. If the employee is able to present such a case, then the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment decision. If the employer is able to do so, the burden shifts back to the employee, who, to defeat a motion for summary judgment, must show that the employer's articulated reason was a pretext for intentional discrimination.

The District Court recited a correct précis of a *prima facie* case of gender discrimination. It did not, however, acknowledge the "uniqueness" of pregnancy discrimination cases and instead, incorrectly treated Doe's claims as if they were an ordinary case of gender discrimination. A *prima facie* case cannot be established on a one-size-fits-all basis. *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 411 (3d Cir. 1999). Indeed, we have often remarked that "'the nature of the required showing' to establish a *prima facie* case of disparate treatment by indirect evidence

'depends on the circumstances of the case.'" *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir.1994) (citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 n. 13 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983)). *Compare Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (setting forth elements of a *prima facie* case of pregnancy discrimination) with *Peletier v. United States*, 388 F.3d 984, 987 (6th Cir. 2004) (setting out elements of a *prima facie* case of gender discrimination).

We have cautioned that "the elements of that *prima facie* case must not be applied woodenly, but must rather be tailored flexibly to fit the circumstances of each type of illegal discrimination." *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996). Moreover, the Supreme Court has cautioned that the *prima facie* requirement for making a Title VII claim "is not onerous" and poses "a burden easily met." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Scheidemantle v. Slippery Rock Univ., State Sys. of Higher Educ.*, 470 F.3d 535, 539 (3d Cir. 2006). The *prima facie* phase of discrimination litigation "merely serves to raise a rebuttable presumption of discrimination by 'eliminating the most common nondiscriminatory reasons for the employers treatment' of a plaintiff." *Burdine*, 450 U.S. at 253-54.

1.

We have previously indicated that establishing a *prima facie* case of pregnancy discrimination differs from establishing a *prima facie* case of gender discrimination. In *Geraci*, we wrote that

> were Geraci alleging that [her employer] terminated her solely because she is a woman, she

> could make out her *prima facie* case by merely showing that she is a member of a protected class, that she was qualified for her position and that she was discharged under conditions that give rise to an inference of unlawful discrimination.

82 F.3d at 580. We modified the first element of a *prima facie* case of pregnancy discrimination to require that an employer have actual knowledge of an employees' pregnancy, reasoning that "pregnancy, of course, is different in that its obviousness varies, both temporally and as between different affected individuals." *Id.* at 581. Therefore, in a case alleging pregnancy discrimination, to raise an inference of any unlawful discharge a plaintiff must adduce evidence that she was pregnant, and, that the employer knew it. *Id.* at 580-81; *accord Prebilich-Holland v. Gaylord Entm't. Co.*, 297 F.3d 438, 444 (6th Cir. 2002). Because we did not need to address the remaining elements of the *prima facie* case of pregnancy discrimination in *Geraci,* we must do so here.

The next two elements of the *prima facie* case remain the same as those of gender discrimination. The plaintiff must be qualified for her job and she must have suffered an adverse employment decision. The fourth element requires that a plaintiff show some nexus between her pregnancy and the adverse employment action. The nexus between a plaintiff's pregnancy and an adverse employment action raises an inference of discrimination.

2.

Neither party disputes that Doe has met her burden on the first three elements of a *prima facie* pregnancy discrimination case: 1) she is or was preg-

nant and that her employer knew she was pregnant; 2) she was qualified for her job; and, 3) she suffered an adverse employment decision. It is the fourth element that is in dispute, namely whether there is some nexus between her pregnancy and her employment termination that would permit a fact-finder to infer unlawful discrimination.

The evidence most often used to establish this nexus is that of disparate treatment, whereby a plaintiff shows that she was treated less favorably than similarly situated employees who are not in plaintiff's protected class. *See Iadimarco v. Runyon*, 190 F.3d 151, 162 (3d Cir. 1999); *see also In re Carnegie Center Associates*, 129 F.3d at 297. Although we have held that "the PDA does not require that employers treat pregnant employees better than other temporarily disabled employees" *In re Carnegie Center,* 129 F.3d at 295, the PDA does require that employers treat pregnant employees no worse. Comparing Doe to other non-pregnant workers who were temporarily disabled, we conclude that Doe has provided sufficient evidence to satisfy the fourth element of the *prima facie* case and has thus raised an inference of discrimination sufficient to defeat summary judgment.

3.

Our factual analysis starts with CARS' somewhat less than compassionate leave policies. A memorandum authored by Kohl reveals that CARS employees were given no personal or sick leave. After one year on the job, employees were given five days' paid vacation. After five years' employment, they were given ten days. Any time taken off during a work day was to be deducted from the employee's vacation time or be unpaid.

Kohl testified that when an employee is so ill that he or she cannot work, CARS required the employee or spouse to call him or another designated supervisor on a daily basis. Employees could also arrange in advance if they knew that their illness or condition would entail missing more than one day's work. Kohl also acknowledged that there are circumstances where it is not necessary to call each day, particularly in situations where it is clear from the nature of the illness or injury that the employee cannot work. This statement contradicted Kohl's statements to the EEOC wherein he testified to the EEOC investigator that employees "needed to call off every day."

The record shows that different CARS employees were treated differently. Mike King, for example, suffered a heart attack while he was employed by CARS and testified that, although he or his wife did call to tell Kohl he was still in the hospital, they did not do so daily, and that he was paid during his absence. King missed two and a half days of work due to his heart attack. Babich also testified that King's wife called in once to tell the office how he was doing, but that no one called every day.

Another employee, Bruce Boynton, left work in the middle of the day and admitted himself into a psychiatric hospital. Kohl called Boynton while he was in the hospital and told him to report back to work or be fired. On another occasion, Boynton went to the emergency room after work. He called Kohl the next morning and called at least once more during the three days he missed for a hernia and back problem.

The testimony of Alivia Babich, Kohl's secretary, confirms this disparate treatment. Babich testified that for every employee, CARS had a "separate set of

rules" and that there was no uniformly enforced rule concerning the use of vacation or sick time. She specifically indicated that there was no rule at CARS which required an employee who was sick to call the company every day to report that they would miss work due to illness. Babich also testified that when CARS employee Michael King suffered a heart attack, neither King nor his wife called-in every day. Further, Babich testified that at least two other employees who missed work due to illness were not required to telephone the company every day. *See* Appendix at 215-216. This testimony indicates that although other employees were not expected to call the office every day, Doe's employment was terminated for precisely this reason. This testimony alone satisfies Doe's burden of establishing that other employees who were similarly situated were treated differently than her. But, there is more.

The District Court dismissed this discrepancy because none of these employees reported to Kohl—they had other supervisors. Whether these other employees had other supervisors is irrelevant—based on Kohl's own testimony in which he indicates that he and he alone could give employees permission to be off sick. In his deposition, he testified:

> Q: . . . was there a policy [regarding sick leave and calling-in]?
> A: Yes, you had to call in to make somebody aware that you weren't coming in or when you planned on coming back.
> Q: Who did you need to call?
> A: Myself.
> Q: Was it acceptable to call anybody else?
> A: If I wasn't there, Mr. Tedesco would have been.

Q: Would it have been acceptable to call Alivia Babich?
A: No.
Q: Would it have been acceptable to call Leona Dunnett?
A: No.
Q: Did you have to call in yourself? If you, if you were unable or sick, could you have a spouse call?
A: Absolutely.

Appendix at 103-104. According to this testimony, all employees had to receive permission from Kohl to be off sick and that the discretion was his alone to grant or deny permission to miss work when an employee was sick. It is irrelevant that the other employees in question (King, etc.) had other supervisors. Babich did report directly to Kohl and did not call every day or give a precise return date when she was out. The District Court found that Doe could not point to any evidence from which a reasonable jury could find similarly situated CARS employees were treated differently regarding calling off work because they were sick. That finding is not supported. Babich's testimony as well as Kohl's own testimony establishes that the treatment given other employees differed from that given to Doe. This raises an inference of discrimination sufficient to satisfy her minimal burden of establishing a *prima facie* case.

The District Court also indicated that these employees had all made arrangements before missing work. There is evidence, however, that Doe did exactly that. Her husband testified that he called Kohl to request a week of vacation for his wife to recover from her surgical procedure and that Kohl agreed to the request. Doe's husband testified that all

of the phone calls to Kohl were made from his father's house. Doe's husband further testified that he talked to Kohl on Thursday, August 10th and got Kohl's permission for his wife to take a vacation the following week. The District Court discounted this testimony because telephone records do not show a phone call from Doe's father-in-law's number to CARS telephone number. Doe's husband's testimony on this point, however, at least raises an issue of material fact. Doe testified that the call from her father-in-law's house may have originated from a cell phone as "there was a lot going on at that time." Appendix at 51-52.

Additionally, Doe points to testimony of Leona Dunnett to re-enforce the point. Leona Dunnett testified that on August 10th, Kohl asked her about coverage of the reception desk for the following week:

Q: What was the substance of the conversation [with Kohl]?
A: About coverage for the reception desk for the following week. He asked me if I had everything covered.
Q: Did [Doe] regularly cover the reception desk?
A: Yes.
Q: All day long?
A: No. Just for the lunch hour.
Q: What was said?
A: There was specific personnel that he did not want answering the phones, so I needed to rearrange lunch schedules so that it was covered without having those persons answering the phones for the following week.
Q: Did [Kohl] say that [Doe] would not be in work for the next week?

A: He said we needed to arrange coverage for the next week.

Appendix at 179. Doe points to this as confirmation that the August 10th phone call did take place—Kohl wanted to make sure that the telephones were covered because he knew Doe would be off the following week.

The District Court further found that Doe had not met this fourth element of the *prima facie* case because the record shows no discriminatory animus toward her for having an abortion. Doe counters with the following testimony of Leona Dunnett:

Q: What was the situation surrounding your leaving CARS?

A: On a daily basis, I go into Mr. Kohl's office to check the warranties, and I was there as he and Alivia were working on whatever, I was checking through the warranties and Alivia said, "I don't know what all this secrecy behind [the plaintiff] losing her baby was." And Mr. Kohl said "she didn't want to take responsibility." Which upset me.

The District Court found these to be "stray remarks" and did not give them much weight. True enough, we held in *Ezold* that stray remarks by decision-makers, which were unrelated to the decision-making process, are rarely to be given weight, particularly if they are made temporally remote from the date of the decision. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). However, we later explained that such remarks could provide background evidence that may be critical to a jury's determination of whether the decision-maker was more likely than not acting out of a discriminatory

motive. *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 2006). As the Court of Appeals for the Eighth Circuit has opined, "although . . . stray remarks, standing alone, may not give rise to an inference of discrimination, such remarks are not irrelevant." *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922 (8th Cir. 2000).

Here, we focus on Kohl's remarks in which he indicated that Doe "did not want to take responsibility." A finder of fact could infer that Kohl was referring to Doe's abortion because before this remark, Babich was talking about her disagreement with the "secrecy" surrounding Doe's baby. It is unclear, however, what "responsibility" Kohl felt Doe should take. Kohl may have been referring to Doe's failure to take responsibility for her selection of an abortion procedure. Kohl may have been referring to Doe's failure to take responsibility for her own job termination. Kohl's commentary could also have been insinuating that Doe did something to cause the loss of her own baby. Or, Kohl could have been castigating Doe for not acknowledging the abortion because of an anti-abortion environment at CARS or Kohl's own personal beliefs about abortion. What is clear is that this particular remark may raise a reasonable inference that the abortion was a factor in terminating Doe's employment. Such comments are "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997) (citations and quotations omitted)[1]

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[1] Although *Bevan* was on appeal following a jury verdict in favor of the plaintiff and the district court's denial of the defendant's motion for judgment as a matter of law, the Supreme

Finally, Doe argues that her discharge only three working days after having an abortion raises an inference of discrimination because the temporal proximity between her abortion and the adverse employment action is "unusually suggestive." We have held temporal proximity sufficient to create an inference of causality to defeat summary judgment. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n.*, 503 F.3d 217, 232-233 (3d Cir. 2007). In assessing causation, we are mindful of the procedural posture of the case. *See id.* at 279 n. 5 ("There is . . . a difference between a plaintiff relying upon temporal proximity to satisfy her *prima facie* case for the purpose of summary judgment, and to reverse a verdict.") (internal citation omitted).

Here, Doe was fired on the day her baby was buried, just three working days after she notified Kohl that she would have to undergo an abortion. Because the District Court found Doe's discharge to coincide with her failure to "make further phone calls to Kohl as he had asked her to do," it reasoned that the timing was not unusually suggestive of discrimination. The temporal proximity, however, is sufficient here to meet Doe's minimal *prima facie* case burden as to the causal connection element. *See e.g. Fasold v. Justice*, 409 F.3d 178, 189-90 (3d Cir. 2005) (discussing a period less than one month and noting that "a short period of time" may provide the evidentiary basis of an inference of retaliation)).

Court in *Reeves* stated that the standard applied in reviewing a judgment as a matter of law is identical to that applied in reviewing a grant of summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

Summary judgment is to be used sparingly in employment discrimination cases, especially where, as here, we are viewing the case at first glance. Mindful that the plaintiff's burden at this first stage is not particularly onerous, we conclude that Doe has established a *prima facie* case.

C. Pretext

The District Court held that even if Doe had established a *prima facie* case, she failed to show that the nondiscriminatory reasons for her employment discharge were pretextual. The record refutes the holding. Once the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802; *see also Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 319 (3d Cir. 2000). When the plaintiff meets this burden, the court's "factual inquiry then proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. The presumption of discrimination established by the *prima facie* showing "simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

If the defendant meets this burden, the plaintiff must then show that the legitimate reasons offered by the defendant are merely a pretext for discrimination. *See Jones*, 198 F.3d at 410. In order to show pretext, a plaintiff must submit evidence which (1) casts doubt upon the legitimate reason proffered by the employer such that a fact-finder could reasonably conclude that the reason was a fabrication; or (2) would allow the fact-finder to infer that discrimination was more likely than not a motivating or determinative cause of the employee's termination. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994);

Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 128 (3d Cir. 1990). Put another way, to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact-finder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, that the proffered reason is a pretext). *See Anderson*, 13 F.3d at 1124; *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir.1993).

Lastly, it is important to remember that the *prima facie* case and pretext inquiries often overlap. As our jurisprudence recognizes, evidence supporting the *prima facie* case is often helpful in the pretext stage, and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other. *Farrell*, 206 F.3d at 286; *see also Iadimarco*, 190 F.3d at 166 (explicitly referring to the evidence of the *prima facie* case in finding evidence supporting pretext); *Jalil*, 873 F.2d at 709 n. 6 ("Although this fact is important in establishing plaintiff's *prima facie* case, there is nothing preventing it from also being used to rebut the defendant's proffered explanation.").

1.

CARS maintains that it fired Doe because she abandoned her job (the week she thought she was 'on vacation' following the abortion and the funeral). Specifically, CARS asserts that Doe was fired because neither she nor her husband called to request Friday, August 11th or the week of August 14th off from work. Unexcused absence from work is a legitimate, nondiscriminatory reason for terminating employment.

Before the District Court and again before us on appeal, Kohl asserts that he never received a telephone call from Doe's husband informing him that Doe would be off work on Friday the 11th and would need vacation time for the week of the 14th. As we noted earlier, that fact is subject to dispute from contradictory evidence. Doe pointed to her husband's testimony to the contrary. The District Court discounted Doe's husband's testimony, finding it "belied by the telephone records of calls from [Doe's husband's] father's telephone number." Dist. Ct. Op. at 12. Here, the District Court inappropriately narrowed Doe's husband's testimony, who indicated that he may have called from a borrowed cell phone. Appendix at 86-87. This testimony is also backed-up by Doe's own testimony that the call "had to be from a cell phone" and that "there was a lot going on at that time." Appendix at 51-52.

Additionally, the testimony of Leona Dunnett could be viewed by a fact-finder as substantiating Doe's claim that the call was made and that she received a week of vacation from Kohl. Leona Dunnett testified that Doe's husband called her on Friday, August 11th and asked what he would need to do for Doe to use vacation time for the week of August 14th. Dunnett also testified that she explained to Doe's husband that he would need to request it from Kohl, and that she then transferred the call to Kohl. She further testified that, after that call, Kohl asked her to make sure she had the receptionist station covered by other employees during the lunch hour for the week in question (a task for which Doe was usually responsible). Kohl's awareness of a receptionist-coverage issue permits an inference that he knew Doe would be on vacation that week.

The District Court held that Doe produced no evidence from which a reasonable jury could disbelieve CARS' asserted reason for firing her and concluded, instead, that she was discharged for discriminatory reasons. The record refutes this conclusion. This testimony creates a genuine issue of material fact as to whether CARS' proffered reasons for terminating Doe's employment were a pretext.

Finally, the District Court did not believe that Doe had pointed to any evidence which cast doubt on whether Kohl had a good faith belief that Doe had abandoned her job. The conversation between Kohl and Babich, in which Kohl remarked that Doe had not taken responsibility for her abortion indicates that Kohl may have had other reasons for terminating Doe's employment than her "abandonment" of her job. These are questions for a jury—not ones that should be resolved on summary judgment. Doe produced testimony which creates genuine issues of material fact, the resolution of which may lead a jury to determine that CARS' asserted reasons for discharging her are pretext.

III.

CARS has filed a cross appeal alleging that the District Court improperly sealed the case. "[O]rders releasing sealed material and denying a motion to unseal are collateral orders within the meaning of 28 U.S.C. § 1291," *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 n. 4 (3d Cir. 1991), and we review the grant or modification of a confidentiality order for an abuse of discretion. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783 (3d Cir.

1994). There was no abuse of discretion. The record fully supports the District Court's order.[2]

IV. Conclusion

Doe has established a *prima facie* case. Furthermore, she has pointed to sufficient evidence from which a fact-finder could infer that the CARS' nondiscriminatory reason for firing Doe was a pretext. The District Court's order will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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[2] CARS also challenges Does' use of a pseudonym. We acknowledge that the use of pseudonyms to conceal a plaintiff's identity has no explicit sanction in the federal rules. Nonetheless, the Supreme Court has given the practice implicit recognition in two abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Although we have yet to address the issue, the decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the court. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979). After a careful review of all the circumstances of this case (including the District Court's thorough hearing), we cannot say the trial court abused its discretion in granting Doe's motion to proceed anonymously.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 12, 2008]

Nos. 06-3625 & 06-4508

DOE,

v.

C.A.R.S PROTECTION PLUS, INC.,

(W.D. Pa. No. 01-cv-02352)

PRESENT: RENDELL and NYGAARD, *Circuit Judges*, and MCCLURE,* *District Judge*

1. Emergency Motion of New York Law Publishing Company, The Legal Intelligencer and The Pennsylvania Law Weekly for Intervention for the Limited Purpose of Seeking Access to Judicial Records and Proceedings.

2. Emergency Motion of New York Law Publishing Company, The Legal Intelligencer and The Pennsylvania Law Weekly for Intervention to Obtain Access to all Judicial Records and Proceedings, Including Dockets.

3. Motion by the Appellant Jane Doe to alter and/or amend opinion.

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* The Honorable James F. McClure. Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.

/s/ Charlene Crisden
CHARLENE CRISDEN
Case Manager 267-299-4923

ORDER

The emergency motions filed by the New York Law publishing company et al., for intervention in the above captioned appeals are hereby DENIED. Movant may pursue this matter with the District Court upon remand.

The motion filed by the Appellant, Jane Doe, to amend our opinion is also hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard
RICHARD L. NYGAARD
Circuit Judge

Dated: June 19, 2008

clc\cc: Gary M. Davis, Esq. Dean E. Collins, Esq.
Brett A. Berman, Esq. Robert C. Clothier, Esq.

No. 08-330

In The
Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY,
THE LEGAL INTELLIGENCER and
THE PENNSYLVANIA LAW WEEKLY,

Petitioners,

v.

JANE DOE, C.A.R.S. PROTECTION
PLUS, INC. and FRED KOHL,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 10, 2008

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Honorable Court exercise jurisdiction when the Third Circuit Court of Appeals correctly denied Petitioners' Motion to Intervene without prejudice to raise the matter before the District Court on remand, when the original parties have reached a settlement and have little or no direct interest in the constitutional issues raised by Petitioner, and when there is a limited record below. Respondent Doe respectfully urges the Court to answer in the NEGATIVE.

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COUNTERSTATEMENT OF THE CASE

Respondents C.A.R.S. Protection Plus, Inc. (C.A.R.S.) and Fred Kohl (Kohl) fired Respondent Jane Doe on the day of her son's funeral. This happened a few days after she terminated her pregnancy through an abortion, one necessary to protect her own health. She asserts in her Complaint, filed in 2001, that her decision to undergo the abortion motivated C.A.R.S. to terminate her employment. This case presents an action between an individual and a small business in which Ms. Doe seeks recompense for her wrongful termination pursuant to the Pregnancy Disability Act (PDA), 42 U.S.C. § 2000e(k).

Because Ms. Doe made the very private decision to have an abortion, she requested that she be permitted to proceed under a pseudonym or, alternatively, under seal. The District Court chose to allow both, recognizing that because of the small size of her employer, there was a real possibility she could be identified, even using a pseudonym and therefore both safeguards were necessary.

Following extensive discovery, Respondents C.A.R.S. and Kohl filed a Motion for Summary Judgment, which the Court below granted. Ms. Doe appealed. The Defendants below filed a Cross-Appeal contesting both the sealing of the record and the permission granted to Ms. Doe to proceed by pseudonym. In a Precedential Opinion filed on May 30, 2008, the Third Circuit reversed the grant of Summary Judgment in favor of the Defendants below. It

affirmed the sealing of the record and the Order allowing the Plaintiff to proceed as Jane Doe. (Appendix A to Petition).

Petitioners, upon learning of the May 30, 2008 Opinion, filed Emergency Motions to be permitted to intervene in the action for the limited purpose of seeking access to records, proceedings and the docket. On June 12, 2008, the Third Circuit issued an Order denying Petitioners' Motions. However, the Court stated that "movant may pursue this matter with the District Court upon remand." (Appendix B to Petition). Petitioners' Petition followed.

On September 9, 2008, the printed date of Petitioners' Petition for a Writ of Certiorari, the Third Circuit Court of Appeals issued a plurality Order, again addressing the intervention issue and matters set forth in Petitioners' footnote 1, found at page 4 of the Petition. A copy of the Order is attached to this Brief in Opposition as Appendix A. The Order clarifies "the scope of the remand regarding the sealing Order." The recent Order makes clear that in remanding, the issue to the District Court, it was not

> our intention that the order we entered sealing the record on appeal would prevent the District Court from considering this issue anew; indeed, our order suggesting further pursuit of this issue was intended to reflect our view that the District Court was the better court in which this issue could be litigated, since it could hold a hearing, and had done so previously on this very issue at the

> outset of the case, and since the record on appeal consists in large measure of the record made in the District Court. The issue of the propriety of the continued sealing of the case now that it will proceed to trial is an important one; the District Court should feel free to decide this issue unfettered by our rulings to date.

(footnote noting Judge Nygard's declination to join in the Order omitted). On September 12, 2008, the Third Circuit issued a two sentence Order, unsealing its September 9, 2008 Order. A copy of the former is attached as Appendix B to this Brief in Opposition.

Following remand by the Third Circuit, the District Court set a trial date of November 10, 2008. In addition, since remand, the parties to the underlying action have engaged in substantive settlement negotiations and reached a resolution of their differences before trial.

REASONS FOR REFUSING THE PETITION

I. Based on the June 19, 2008 and September 9, 2008 Orders of the Third Circuit Court of Appeals, Petitioners' Appropriate Remedy is With the District Court and Not This Honorable Court.

Petitioner posits that pursuing its constitutional concerns on remand before the District Court "makes no sense," reasoning that because the Third Circuit's

May 30, 2008 decision "specifically sanctioned the District Court's sealing, it would be futile to ask the District Court to reverse an action the Third Circuit expressly upheld." (Petition for Certiorari at page 4, footnote 1).

While Respondent Doe believes that the June 19, 2008 Order denying Petitioners' Motions also provided them with a *tabula rasa* upon which to present their arguments for access to the District Court, she asserts that any ambiguity was resolved upon issuance of the September 9 Order. Rather than ruling substantively upon the merits of Petitioners' claims, the matter was remanded to the District Court's discretion and determination. Far from making "no sense" or being futile, it is apparent that the Third Circuit decided that the appropriate forum for the initial determination of Petitioners' claims is before the District Court.

The Third Circuit's Order sets forth a practical and appropriate procedure, given the unique facts of this case. Petitioners filed their Motions in the Third Circuit, *after* issuance of the May 30, 2008 Precedential Opinion. Indeed, given that the Opinion allegedly provided Petitioner with their first notice concerning the existence of the underlying action, neither Court had any record upon which to address the merits of this issue of constitutional proportions. The logical, and Respondent Doe believes, proper and practical disposition of these issues requires the "without prejudice" remand to the District Court for its consideration afforded by the Third Circuit.

Should this Honorable Court grant the Petition, it will also operate with a limited record. Certainly, one potential outcome of a hypothesized grant of the Petition would be a remand to the District Court for an evidentiary or other determination, effectively the same relief *already granted* to Petitioners by the September 9, 2008 Order. Such an outcome would result in further delay in this already seven-year-old case, as well as a significant expenditure of time and expense by the underlying parties, Ms. Doe, an individual and C.A.R.S., a small company, whose interests, frankly, lay elsewhere than with whether the courts maintain "secret cases and dockets." (Petition at p. 16).[1]

This Court has stated that if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, "it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944). "It has long been the Court's considered

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[1] In making this argument, Respondent Doe states that she remains vitally interested in protecting her anonymity and redaction of potentially identifying information contained in the record, issues that Petitioners concede are *not* being disputed. (*See* Petition at p. 5). Nonetheless, Respondent has invited Petitioners to engage in negotiations regarding their First Amendment issues, both directly and through the Third Circuit's Mediation Program which was willing to attempt to facilitate a resolution. Petitioners declined to participate in any resolution that would not result in a reversal or withdrawal of the Third Circuit's decision in the underlying case.

practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which its is to be applied . . . " *Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S. Ct. 1636, 1642 n.11, 137 L. Ed. 2d 945 (1997), *quoting*, *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 1389-1390, 89 L. Ed. 1725 (1945). Moreover, it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. *Id.*, *citing*, *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482 (1905).

A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all. *Texas v. U.S.*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998). Ripeness analysis requires the court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* 523 U.S. at 300-301, 118 S. Ct. at 1260. *See also Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991) ("justificiability concerns not only the standing of litigants to assert particular claims, but also appropriate timing of judicial intervention"); and *Anderson v. Green*, 513 U.S. 557, 559, 115 S. Ct. 1059,

1060, 130 L. Ed. 2d 1050 (1995) ("ripeness is peculiarly a question of timing and it is the situation now, rather than the situation at the time of the decision under review that must govern").

As recently articulated by the Tenth Circuit Court of Appeals in *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008), the ripeness inquiry focuses not on whether the party was in fact harmed, but rather, whether the harm asserted has matured sufficiently to warrant judicial intervention. The focus is when in time it is appropriate for the court to take up the asserted claim.

Ms. Doe argues that this is not the appropriate time for this Honorable Court's intervention. Despite Petitioners' protestations, the Third Circuit has gone out of its way and made abundantly clear that they may proceed before the District Court with a clean slate and no presumption either way concerning the substantive merits of their claim of a right to intervene or their First Amendment concerns. By filing its Petition, Petitioners ask this Court to intervene *before* the District Court has an opportunity to hear and determine the issues presented. Clearly, such fast tracking of this matter is premature. If Petitioners believe that their arguments for intervention and the First Amendment issue are so compelling, they should welcome the opportunity to present them in the most appropriate forum, and one in which the Third Circuit invited their development – the District Court. Thus, even accepting, *arguendo*, the merits of

Petitioners' arguments, this is not an appropriate time for this Court to become involved.

Petitioners suffer no hardship if the Petition is denied. They are not out of court, and no adverse determination exists concerning the substantive merits of their claims. They are merely remanded to the District Court, where they can present their case in full as to why intervention is appropriate and the sealing of this case was inappropriate. On the other hand, the hardship on Ms. Doe both emotionally and financially would be enormous.

On September 25, 2008, Petitioners filed a letter acknowledging the Orders of the Third Circuit issued subsequent to the filing of their Petition setting forth why they believed that resort to the District Court remained a futile gesture. Petitioners argue that the Third Circuit record remains sealed, regardless of any District Court determination. They also assert that the remand Order does nothing to alter the fact that the underlying action existed without public knowledge of it for seven years.

Ms. Doe acknowledges the obvious fact that the District Court cannot order the unsealing of the Third Circuit record. However, other than the parties' briefs, there is little, if anything, in the Third Circuit that would be of interest to Petitioners or would not already be a part of the record below. Moreover, if the Petitioners would remain unsatisfied with the ultimate disposition below, means would be available to present the issues to the Third Circuit Court of

Appeals. In any case, this Respondent is willing to unseal the record subject with limited redactions to protect her identity. As such, there is no case or controversy.

As to their second argument, the decision upholding the sealing of the record took place based on the interests and arguments of two private parties. The considerations raised by Petitioners were obviously neither presented nor considered below or on appeal. Petitioners, through the remand, would have ample opportunity to argue the merits of public access and the interests of the press, as set forth in their Petition. Their arguments should first be put forth in the District Court as permitted by the Third Circuit remand.

It is apparent that this is not the time for intervention by this Honorable Court. Petitioners must be required to first present their arguments in the appropriate forum, the District Court. Accepting this case for review *at this time*, given its facts and existing record, is clearly inappropriate.

II. In the Alternative, Allowing Intervention Violates Federal Rules of Civil Procedure Rule 24(b)(3)

Rule 24(b) of the Federal Rules of Civil Procedure allows permissive intervention. Upon timely motion, the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a

common question of law or fact." (F.R.Civ.P., Rule 24(b)(1)(B)).[2] Under subsection(b)(3),

> In exercising its discretion, the court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights.

F.R.Civ.P., Rule 24(b)(3).

Ms. Doe argues, alternatively, that on the merits of intervention, Petitioners' request to intervene violates Rule 24(b)(3).[3] The delay resulting from resolution of Petitioners' issues in this Court clearly prejudices the adjudication of the rights of the original parties.

As set forth in the Rule, the decision as to whether to allow permissive intervention is within the discretion of the trial court. This is an area where a court's discretion is broad. *McDonald v. Means*, 309 F.3d 530, 541 n.11 (9th Cir. 2002). Even if the requirements of Rule 24(b) are satisfied, the court may still properly refuse to allow intervention. *South Dakota ex rel. Barnett v. United States Department of Interior*, 317 F.3d 783, 787 (8th Cir. 2003), *quoting*, 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1913 at 376-377.

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[2] Ms. Doe presumes that this is the section under which Petitioners proceed.

[3] The fact that the District Court has *never* had the opportunity to decide this question is further evidence that review by this Court would not be timely/ripe.

Where settlement may be jeopardized by intervention – even as of right – the interests prejudiced, including the parties' interest in avoiding continuing litigation, will weigh against permitting intervention. *Farmland Dairies v. Commissioner of New York Department of Agriculture*, 847 F.2d 1038, 1044 (2d Cir. 1988). *See also Gallick v. Barto*, 828 F.Supp. 1175, 1178 (M.D. Pa. 1993) (intervention denied in part based on prejudice and delay where parties settled the underlying action).

Applications to intervene for limited purposes are disfavored, since the "rules do not anticipate limited 'special status' intervenors." *New York News, Inc. v. Newspaper and Mail Deliverers Union of New York*, 139 F.R.D. 291, 293 (S.D. N.Y. 1991), *aff'd sub nom., New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992) (intervenor sought intervention for sole purpose of filing a Rule 11 motion). *See also Kamerman v. Steinberg*, 681 F.Supp. 206, 211 (S.D. N.Y. 1988) (denial of application for intervention for purposes of filing motion to stay the federal proceedings).

A court may also properly deny an intervenor's application when its interest is not related to the underlying action. *See Sierra Club v. United States Army Corps of Engineers*, 709 F.2d 175, 176 (2d Cir. 1983), or where disposition of the case without intervention will not impair the movant's ability to protect his interests by other means. *New York News, Inc., supra*, 139 F.R.D. at 293.

Petitioners' Petition should be denied on the merits based on factors of delay and prejudice. This is a seven-year-old case, in which the parties have a settlement agreement in place.[4] Intervention would force Ms. Doe, an individual of limited means, to continue this litigation beyond the settlement, likely for years. Given the nature of Ms. Doe's claim, compassion for her need of closure must be a factor considered by the Court. Intervention by Petitioners would artificially extend the litigation beyond what both original parties desire. Moreover, as a practical matter, continuation of this litigation bears significant financial costs. Petitioners concede that if they are permitted to intervene and are successful in their Petition, Ms. Doe will remain anonymous, and they are agreeable to redacting the record to keep it so. What then is her interest in opposing this Petition, and if unsuccessful, undertaking the expense of a full briefing and argument before this Honorable Court? As will be discussed more fully *infra*, this case, in this posture, is an inappropriate forum through which Petitioners can present their arguments against the so called "secret docket" of the District Court and/or Third Circuit Court of Appeals. Given that other alternatives exist for Petitioners, intervention under Rule 24(b) should not be permitted, based on delay and prejudice. Ms. Doe should be allowed some

[4] As of this writing, this case continues as active on the District Court docket because the agreed upon terms of the settlement will take a few months to consummate.

closure from her dual traumas of losing her son and her job.

III. Although This Case is Not the Proper Vehicle for Presentation of Petitioners' Claims, They are Not Without Remedy

Based upon Petitioners' refusal to proceed before the District Court following the Third Circuit's Orders of June 12, 2008 and September 9, 2008 and its declination to negotiate with Ms. Doe on a resolution in this case (certainly both within their rights), it is apparent that they are after bigger game than this particular litigation. Petitioners have declared war on its perception of judicial secrecy and will be satisfied only by a more global determination. Ms. Doe asserts that for a number of reasons, this case is the wrong vehicle for Petitioners to achieve this larger goal. However, Petitioners are not without remedy, nor does this issue become a recurring one that escapes resolution.

But for the fact of Ms. Doe's abortion, her case was probably not substantively different from the 19,244 other employment discrimination cases filed in 2001. (Kyckelhahn and Cohen, *Civil Rights Complaints in U.S. District Courts, 1990-2006*, Bureau of Justice Statistics, Department of Justice (2008)). This is a case between an individual and her small private corporate employer concerning internal decisions

made by management. The public's interest in this case is minimal.[5] Moreover, after seven years of litigation, the parties have resolved their differences, sought closure and hope to move on through the recent settlement. At this point, neither Ms. Doe nor (she believes) C.A.R.S. have any interest in seeing this case continue, probably for years, at additional financial and emotional expense.

Ms. Doe argues that the parties and Petitioners are best served if Petitioners are left to the remedy of mandamus. Indeed, a review of the authorities cited in the Petition reveals that of the cases relied upon by Petitioners, the following can be identified, in whole or in part, as mandamus actions: *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In Re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993); *In Re State Record Company*, 917 F.2d 124 (4th Cir. 1990); and *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991). (*See generally*, 28 U.S.C. § 1361 and 28 U.S.C. § 1651).

In *In Re McClatchy Newspapers, Inc.*, 288 F.3d 369 (9th Cir. 2002), *cert. denied*, 537 U.S. 944, 123 S. Ct. 346, 154 L. Ed. 2d 252 (2002), the Sacramento

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[5] To the extent there is public interest in this case, it can be fully satisfied by the Third Circuit's precedential opinion, which sets forth the circumstances of Ms. Doe's claim.

Bee newspaper sought access to unredacted letters offered by a party to reduce his criminal sentence. Since the paper was not a party to the underlying criminal action, it lacked standing to appeal. However, access was permitted under its alternative writ of mandamus argument. In granting access to the information sought, the court applied the five part test from *Bauman v. U.S. District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977): 1) whether the party seeking the writ has no adequate means to attain the desired relief; 2) will petitioners be damaged or prejudiced in a way not correctable on appeal; 3) whether the lower court's order is clearly erroneous as a matter of law; 4) is the order an oft repeated error or manifests a persistent disregard of the federal rules; and 5) whether the order raises new and important problems or issues of law of first impression. *See also Virginia Department of State Police v. The Washington Post; The Virginian Pilot; Richmond Times Dispatch*, 386 F.3d 567, 574 n.4 (4th Cir. 2004), *cert. denied*, 544 U.S. 949, 125 S. Ct. 1706, 161 L. Ed. 2d 526 (2005) (a mandamus petition is the preferred vehicle for review of orders sealing or unsealing records.)

Mandamus is appropriate where the petitioners demonstrate a clear abuse of discretion or conduct amounting to a disruption of judicial power. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and they carry the burden of showing that their

right to issuance of the writ is clear and indisputable. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 309-310, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989). In addition to the above factors, the petitioners must satisfy the issuing court that the writ is appropriate under the circumstances. Such hurdles, however demanding, are not insurmountable. *Cheney v. United States District Court for the District of Columbia*, 540 U.S. 367, 381; 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004).

Ms. Doe argues that rather than dragging her into a protracted First Amendment argument that, by Petitioners' own admission, will not jeopardize her anonymity, the better course is for them to pursue mandamus. Petitioners' constitutional concerns can all be addressed in such litigation, absent the necessity of her participation. Moreover, by following this path, this Honorable Court would have a fully developed record upon which to make a determination in the event a subsequent Petition was filed.

IV. The Respondents' Settlement Precludes a Case or Controversy

With Ms. Doe and Respondent, C.A.R.S. and Kohl having settled the underlying action, she argues that there is no case or controversy present for this Honorable Court's determination. While the original parties' settlement neither includes Petitioners nor covers the issues raised in their Petition,

the underlying controversy has gone away, leaving no one with an incentive to contest their claims, should this Court grant the Petition.

Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies, and Article III standing enforces the constitutional case or controversy requirement. No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Hein v. Freedom From Religion Foundation*, ___ U.S. ___, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007). The case or controversy requirement subsists through all stages of federal judicial proceedings, and it is not enough that a dispute was very much alive when suit was filed. *Lewis v. Continental Bank*, 494 U.S. 472, 478, 110 S. Ct. 1049, 1054, 108 L. Ed. 2d 400 (1990). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971) (Federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them). The parties must continue to have a personal stake in the outcome of the lawsuit. *Lewis*, *supra*, 494 U.S. at 478, 110 S. Ct. at 1254.

A defendant's voluntary cessation of a challenged practice does not necessarily deprive a federal court of its power to determine the legality of the practice. However, the court does not have a license to retain jurisdiction over cases in which one or both parties plainly lack a continuing interest, as when the

parties have settled or plaintiff, pursing a non-surviving claim, has died. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189, 192, 120 S. Ct. 693, 708, 710, 145 L. Ed. 2d 610 (2000).

The *Friends of the Earth* case cited (528 U.S. at 192, 120 S. Ct. at 710) two cases as examples in support of its proposition. In *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974), (*per curiam*), a non-class action challenge to the constitutionality of a law school's admission process was mooted when plaintiff, admitted pursuant to a preliminary injunction, neared graduation, and, when as a matter of school policy, he would be permitted to complete the term and receive his degree.

Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997), involved a non-class action challenge to Arizona's English as the official language law. The case became moot when the plaintiff, a state employee, left for private employment. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 1390, 146 L. Ed. 2d 265 (2000) (a case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome).

The settlement by the underlying parties makes this matter moot. With the resolution and Petitioners' stipulation that Ms. Doe's identity would be protected, in any event, there is no case or controversy for resolution by this Court with these parties.

Petitioners might assert in response that their Petition falls within the established exception to mootness for disputes capable of repetition, yet evading review. This exception applies where the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652, 2662, 162 L. Ed. 2d 329 (2007).

Given the availability of a mandamus action in which to present their constitutional claims, Petitioners' secrecy concerns are unlikely to evade review for very long following denial of their Petition. Indeed, the suggested alternative of mandamus will allow them to fully develop the record, with fully engaged adversaries. *See also DeFunis, supra*, 416 U.S. at 319, 94 S. Ct. at 1707 (if the challenged admissions procedures remain unchanged, there is no reason to suppose that a subsequent case attacking them will not come along with relative speed).

Recent events have changed the dynamic of this matter. The settlement by the Respondents has eliminated the foundation upon which Petitioners hoped to erect their constitutional challenge. No case or controversy exists, thereby dooming their Petition.

CONCLUSION

Petitioners' interests are much larger than this dispute between a woman and her small former employer. They have other means to fully litigate the constitutional issues they present. The recent settlement by the parties below further reinforces the conclusion that Ms. Doe's case is the wrong one for presentation of Petitioners' concerns. For the reasons stated herein, Respondent, Jane Doe, respectfully urges this Honorable Court to deny Petitioners' Petition.

Respectfully submitted,

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Supreme Court, U.S.
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No. 08-330

IN THE

Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY, ET AL.,
Petitioners,

v.

JANE DOE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-NINE MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici curiae ("Media *Amici*"), described more fully in Appendix A, are The Reporters Committee for Freedom of the Press and twenty-nine of the nation's leading news organizations – ABC, Inc., The Associated Press, The Association of Alternative Newsweeklies, The Association of American Publishers, Inc., Bloomberg News, CBS Broadcasting Inc., Cox Newspapers, Inc., Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., The Hearst Corporation, Magazine Publishers of America, Inc., The McClatchy Company, National Newspaper Association, National Public Radio, Inc., NBC Universal, Inc., The New York Times Company, Newspaper Association of America, The Newspaper Guild - CWA, Newsweek, Inc., The Radio-Television News Directors Association, Reuters America LLC, The Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, Inc., U.S. News & World Report, L.P., and The Washington Post.

Media *Amici* often rely on access to court proceedings and documents to report on matters of public concern. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

(1980), Media *Amici* and other journalists need unfettered access to all information that sheds light on the function of the courts, whether in civil or criminal cases. This case concerns issues critical to the media specifically and the public in general: when a court may cut off public access to proceedings and documents, and whether it may deny an interested person the ability to challenge such a sealing order.

SUMMARY OF ARGUMENT

Media *Amici* urge the Court to accept review of this case in order to make clear that the constitutional right of access to the courts extends to civil records and proceedings.

Despite the profound issues at stake – abortion, medical privacy, and alleged employment discrimination – this case was conducted entirely in secret for *seven years*. Searching for the case on the district court or circuit court docket yields no result. The hearings, briefs, court records, and even trial court orders were all hidden from public view, and it was not until the Third Circuit issued a precedential opinion in May that the public became aware of the existence of this case. Even now, every record is sealed save the Third Circuit's orders and the Supreme Court docket.[2] Absent correction from this Court or a change of heart below, the case will presumably go to trial in secret.

This Court should clarify that such an arrangement is unconstitutional. Nearly 30 years ago, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the Court recognized a presumptive right of access to criminal proceedings. The Court has reiterated its holding repeatedly, and the circuits since have applied the same reasoning to recognize a corresponding right of access to civil proceedings and to court records. But the decision below – a reported,

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[2] Like Petitioners, Media *Amici* do not challenge Plaintiff Jane Doe's ability to proceed using a pseudonym, an issue not before the Court.

precedential decision affirming a blanket sealing order without any explanation or findings of fact – has highlighted the uncertainty created when the *Richmond Newspapers* Court reserved the issue of access to civil proceedings. Because the historical and policy considerations underlying the right of access in criminal cases are largely similar to those in civil cases, the Court should accept review of this case to clarify that the public has a qualified constitutional right of access to civil proceedings and records.

The Court should also accept review to correct the Third Circuit's error in refusing, with little explanation, even to allow Petitioners to intervene for the limited purpose of challenging a sealing order. Such a ruling effectively denied the public and press the ability to challenge sealing orders and thereby eviscerated any right of access to court proceedings and documents. In light of prior rulings of this Court that require courts to provide the public with notice and an opportunity to be heard before limiting access to proceedings, lower courts generally agree that intervention is the best (and sometimes only) way for a member of the public to challenge a closure order. But whatever the method of challenging secrecy, the press and the public must have some means of objecting to the closure of court proceedings and records. Particularly in a case of significant public importance, it is imperative, at minimum, that this Court protect the right of the public to be heard on the issue of its exclusion.

Review is also appropriate because the Third Circuit has sanctioned a drastic departure from the "accepted and usual course of judicial proceedings," S. Ct. R. 10(a), which warrants reversal as an exercise

of this Court's supervisory powers. The complete secrecy in this case – as well as the lower courts' failure to issue sealing orders, to make any individualized findings, to explore less restrictive alternatives, or to give the public an opportunity to be heard – constitutes an egregious violation of well-settled law.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW HIGHLIGHTS UNCERTAINTY ON THE FUNDAMENTAL ISSUE OF SECRECY IN COURT PROCEEDINGS.

A. The First Amendment and this Court's jurisprudence support recognition of a qualified public right of access to civil proceedings.

This Court consistently has recognized that the public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases. *See Richmond Newspapers*, 448 U.S. at 573 (plurality opinion) ("we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (statute mandating closure of courtroom during testimony of minor victims of sex crimes violated the First Amendment); *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984) (recognizing public right of access to *voir dire* proceedings); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (unanimously recognizing right of access to hearing on motion to suppress evi-

dence); *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13 (1986) (recognizing right of access to pretrial hearings); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (right of access to preliminary hearing).

This presumption of access is based on the "unbroken, uncontradicted history" of public criminal proceedings in Anglo-American law and the positive contribution of openness toward the historical function of the proceedings. *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion); *see also Press-Enterprise I*, 464 U.S. at 505-07 (discussing history of openness in criminal trials). Among other benefits, the public's ability to observe criminal proceedings enhances the legitimacy of verdicts, fosters both fairness and the appearance of fairness, and guards against abuse. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe*, 457 U.S. at 606. Accordingly, for almost three decades it has been clear that a judge may close proceedings in a criminal case only after making specific, on-the-record findings that "closure is essential to preserve higher values [than the public's right of access] and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.

This Court has not directly addressed whether the public also has a constitutional right of access to civil cases, but a plurality found that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality opinion).

Many federal courts subsequently have recognized a public right of access to proceedings and documents in civil cases, though they have differed on the origin and scope of the right. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) ("the First Amendment does secure a right of access to civil proceedings"); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) ("we agree with the Third Circuit in *Publicker Industries* ... that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*"); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984) (recognizing a constitutional right of access to contempt proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (First Amendment and common law limit judicial discretion to seal documents in civil litigation); *Newman v. Graddick*, 696 F.2d 796, 801-03 (11th Cir. 1983) (constitutional right of access to proceedings and common-law right of access to documents in civil case involving prison conditions).

Indeed, a unanimous California Supreme Court found both a logical basis and universal support for a constitutional right of access to civil proceedings, saying that "[a]lthough the high court's opinions in *Richmond Newspapers, Globe, Press-Enterprise I*, and *Press-Enterprise II* all arose in the criminal context, the reasoning of these decisions suggests that the First Amendment right of access extends beyond the context of criminal proceedings and encompasses civil proceedings as well." *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999). It added that "[i]ndeed, every lower court opinion of

which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials." *Id.* (internal citations omitted). The District of Columbia Court of Appeals agreed, finding that "[n]o court has expressly concluded that the first amendment does not guarantee some right of access to civil trials." *Mokhiber v. Davis*, 537 A.2d 1100, 1107 n.4 (D.C. 1988).

The circuits have recognized that public access to civil court records is equally important. For example, the Second Circuit made clear that "the press and public possess a qualified First Amendment right of access to docket sheets" in part because "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 93 (2d Cir. 2004); *see also Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (finding "a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith"); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179 (strong presumption of access to civil court records and proceedings); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (constitutional right of access to "documents filed in connection with a summary judgment motion in a civil case"); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984) (constitutional presumption of access to evidence supporting dispositive motion in civil case); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*,

24 F.3d 893, 897 (7th Cir. 1994) (assuming both a First Amendment and a common law right of access to civil litigation documents).

B. The public policy interest in access to civil proceedings and records mirrors the long-recognized interest in open criminal proceedings.

The press and public have a legitimate interest in knowing the details of this case, which is a case of first impression in the Third Circuit and deals with fundamental issues of privacy, abortion rights, and employment discrimination. That the proceeding is civil, rather than criminal, is immaterial. "[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386-87 n.15 (1979).

The circuits likewise have recognized that the public policy interest in open civil proceedings mirrors the interest in open criminal proceedings. For example, the Sixth Circuit recognized a First Amendment right of access to civil trials because "[c]ivil cases frequently involve issues crucial to the public – for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc." *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179. The court added that "[t]he concern ... that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting," because "[i]n either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* The Seventh Circuit

added that "mistakes in civil proceedings may be more likely to inflict costs upon third parties, therefore meriting even more scrutiny." *Grove Fresh Distributors*, 24 F.3d at 897.

The Third Circuit itself agreed, finding that "[p]ublic access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs." *Publicker Indus., Inc.*, 733 F.2d at 1070. But the decision below is an implicit repudiation of this view, and the Court should grant review to make clear that the public and press have the same qualified right of access to civil proceedings that they enjoy with respect to criminal proceedings.

C. The total secrecy below, ratified in a precedential opinion from the Third Circuit, highlights the need for guidance from this Court.

The court below neither embraced nor rejected this broad consensus in favor of a constitutional right of access to civil cases. Indeed, the opinion addressed the issue only in passing, saying "[t]here was no abuse of discretion. The record fully supports the District Court's order." *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 371 (3d Cir. 2008).

Nevertheless, the Third Circuit's published, *precedential* opinion sealing the case in its entirety – with no explanation, no findings of fact, and no opportunity to object – is likely to be interpreted by future litigants as a rejection of the constitutional presumption in favor of access. If so, the decision would create a split with the Second, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, *see supra*, Sec-

tion I.A., as well as the many other courts that have recognized a First Amendment right of access to civil proceedings and records. And even if it is not intended to be an explicit rejection of the presumption of openness, the opinion below creates a massive exception by authorizing secret proceedings with no public notice or justification. As Petitioners noted, such a broad exception would itself create a circuit split. *See* Petition for a Writ of Certiorari at 10-13. Such a sweeping and perfunctory rejection of the interest in access should be reversed.

Of course, recognizing a constitutional right of access would not mean that judges can never conduct closed civil proceedings or seal civil records. Instead, it means simply that they would have to do so only after making specific, on-the-record findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. This would represent a reasonable interpretation of this Court's holdings in *Richmond Newspapers* and subsequent cases, and it is the same standard that governs criminal cases nationwide.

In addition to correcting the errors below, clarifying that the *Press-Enterprise* standard extends to civil cases would curb the pervasive secrecy that has infected state and federal trial courts. In recent years, trial courts have maintained entire secret dockets containing (at minimum) tens of thousands of cases, often mundane legal matters involving the rich and politically powerful. For example, following the Second Circuit's decision in *Pellegrino*, 380 F.3d 83, the State of Connecticut alone unsealed more than 10,000 case files on its secret docket, most of

which "comprised divorce or family law matters involving state officials, judges, prominent attorneys, corporate officers, and celebrities, including Bruce Springsteen's saxophonist and a soap opera star." Meliah Thomas, *Comment: The First Amendment Right of Access to Docket Sheets*, 94 Cal. L. Rev. 1537, 1552 (2006) (internal citations omitted).

Even within the federal system, it is impossible to know even the approximate number of cases that are sealed in their entirety. A 2003 survey found that "[a]s of June 2003, the Middle District of Georgia had 33 secret civil cases pending, the Northern District of Florida had seven secret civil cases pending, the Western District of Arkansas and the Eastern District of Wisconsin each had two secret civil cases pending, and the Districts of North Dakota and South Dakota did not have any secret civil cases pending." However, "[m]any federal courts would not say how many cases they had, and the Administrative Office of the U.S. Courts does not monitor the number of secret cases filed in federal courts across the country."[3]

Heightening this uncertainty is the fact that the Federal Rules of Civil Procedure are silent on the procedural prerequisites to sealing civil court documents. This leaves districts to decide for themselves whether to enact local rules honoring a presumption of access to civil documents and proceedings and

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[3] *See* Reporters Committee for Freedom of the Press, *Secret Justice: Secret Dockets*, *available at* http://www.rcfp.org/secretjustice/secretdockets.

leads to very different standards even among neighboring districts. For example, the Eastern District of Oklahoma notes that "sealed documents, confidentiality agreements, and protective orders are disfavored," adds that a "motion seeking [a sealing order] must contain sufficient facts to overcome the presumption in favor of disclosure," and instructs that "[t]he relief sought shall be narrowly tailored to serve the specific interest sought to be protected." E.D. Okla. Local Rule 79.1. Meanwhile, the local rules for the Western District of Oklahoma, like many other districts, are silent on the issue. By granting review and clarifying the constitutional standard, the Court would provide uniformity that has been absent with regard to civil litigation.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHEN AND HOW THE PUBLIC MAY INTERVENE TO CHALLENGE A CLOSED PROCEEDING.

A. Intervention for the limited purpose of challenging sealing orders should be permitted to preserve the presumptive right of access to court proceedings and documents.

If the public has a right of access to court proceedings and documents, no matter its source and content, there must be some procedural means for preserving that right. By refusing to allow Petitioners to intervene for the purpose of challenging secrecy, the Third Circuit impermissibly cut off the only feasible method of objecting to the closure.

While there is not complete uniformity on the issue, "[t]he courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through intervention for that purpose." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988)); *see also In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" for challenging closure orders); *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (citing "wide approval" of intervention to challenge protective orders). Indeed, some courts have ruled that the press must move to intervene in order to challenge closure, rather than petition for mandamus. *See Hertz v. Times-World Corp.*, 528 S.E.2d 458, 463 (Va. 2000) (mandamus was erroneously granted because intervention provided adequate remedy at law).

Intervention is the preferred method of challenging closure orders for several reasons. It leaves the closure decision in the hands of the courts that are most familiar with the case and that will be directly affected by the decision. *See, e.g., News American Division v. State*, 447 A.2d 1264, 1271-72 (Md. App. 1982). It is also the most efficient and least disruptive means for challenging a closure order, because other courts are not prematurely brought in to regulate the dispute. *Id.* at 1272. In other words, intervention allows the court to make a ruling based on the facts and evidence presented to it, and with the benefit of arguments presented by all interested persons, before another court steps in to review whether that closure or sealing order was valid.

Moreover, intervention is the best solution because it allows the public and press an opportunity to be heard before proceedings are closed. "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe*, 457 U.S. at 609 n.25 (1982) (citing *Gannett*, 443 U.S. at 401 (Powell, J., concurring)). Intervention is optimal because "the values that animate the presumption in favor of access require as a 'necessary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous.'" *In re Associated Press*, 162 F.3d at 506 (internal citations omitted).

Intervention also benefits the court because it allows all interested persons to discuss the potential harm in disclosure and whether less restrictive alternatives are available. This allows the trial court to issue specific findings of fact that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. This procedural component is vital, among other reasons, because it is an essential prerequisite to meaningful appellate review of the sealing. *Id.* ("[t]he interest [in closure] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered").

B. In addition to correcting the erroneous sealing in this case, there is an important policy interest in this Court establishing clear guidelines for seeking access to court records.

The Court should accept review in order to recognize explicitly the right to intervene for the limited purpose of challenging a sealing order. This case highlights the need for a clear-cut intervention right, because the Third Circuit cut off the only feasible path that Petitioners could use to challenge the sealing of the appellate record.

Intervention is permissible at the appellate level as well as before the trial court. *See International Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention [in district court] may be applicable in appellate courts .... [W]e think the charged party would be entitled to intervene"); *Building & Constr. Trades Dep't. AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("standards for intervention applicable in the district court" also apply in appellate courts). Indeed, intervention may provide the only method short of Supreme Court review for asserting the right of access to appellate proceedings and records, since mandamus would be available only from the Supreme Court and initiating a collateral proceeding would be either impossible or utterly impractical.

Nevertheless, the Third Circuit did not evaluate the Petitioners' request to unseal the records in this case. Rather, it refused, with little explanation, even to allow the Petitioners to intervene for the purpose of challenging the closure. *See Doe v. C.A.R.S. Protection Plus, Inc.*, --- F.3d ----, 2008 WL 4190266 (3d Cir. Sep. 09, 2008). Nor did it suggest another way to challenge the closing, aside from suggesting in a subsequent order that Petitioners go back to the district court. *Id.* But this is a partial remedy at best, because the district court cannot unseal the appellate

record. This Court should clarify that, whatever the merits of the underlying request to unseal, the Third Circuit should have allowed Petitioners to intervene for the purposes of challenging the closures.

III. TOTAL SECRECY BELOW, WITHOUT EXPLANATION OR OPPORTUNITY TO OBJECT, IS A DRASTIC DEPARTURE FROM THE "ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" AND WARRANTS EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

One of the Court's considerations for granting review is whether a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). This criterion is undoubtedly met here, as the Third Circuit has sanctioned a drastic departure from the usual course of a civil proceeding.

As discussed *supra*, Section I, it is neither typical nor constitutionally acceptable for a court to conduct a case entirely in secret, without entering a sealing order, articulating any findings to support secrecy, or considering the possibility of less restrictive alternatives such as closing portions of hearings and redacting records.[4] First, it is well established that courts

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[4] The fact that the Defendants also opposed the secrecy in this case underscores the need for some oversight of the lower courts' activity. *See C.A.R.S. Protection Plus*, 527 F.3d 358 at 371.

must make findings to support closing proceedings or keeping documents under seal. *See Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992) (vacating sealing order because proper sealing requires "a showing of extraordinary circumstances set forth by the district court in the record"); *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (holding that it was improper for district court to seal "[a]lmost every document" filed in the case without making any findings in support); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (vacating order to seal plea agreement where the court "failed to articulate any findings in support of the ... Order); *Application of National Broadcasting Co., Inc.*, 828 F.2d 340, 346 (6th Cir. 1987) (vacating order sealing pleadings and exhibits, and remanding for more adequate findings and consideration of less restrictive alternatives). Yet neither the district court nor the Third Circuit made any public findings to support a sealing order. Indeed, neither issued a public sealing order, and the two perfunctory sentences at the end of the Third Circuit's opinion provide the only public discussion of the sealing issue.

Second, the district court and Third Circuit appear to have given no consideration to the possibility of fashioning a less restrictive alternative to blanket secrecy, such as redacting documents and selectively closing hearings. "[P]rior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests." *Press-Enterprise I*, 464 U.S. at 510." Thus, for example, "the constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of

jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses." *Id.; see also Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where public release of court records presents a risk to national security, "[p]ublic release of redacted material is an appropriate response").

By contrast, the courts below sealed the case in its entirety. Even the opinions of the district court are entirely sealed. *See Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348-49 (7th Cir. 2006) (hoping "never to encounter another sealed opinion" because "[t]he political branches of government claim legitimacy by election, judges by reason"). It simply cannot be the case that every pleading, transcript, docket, and district court order in this case contains information so sensitive that it cannot be revealed. *See id.* ("[t]he Supreme Court issues public opinions in all cases, even those said to involve state secrets").

Third, neither court provided the public with notice and an opportunity to comment on proposed closure orders, in violation of accepted procedural standards. *See Globe*, 457 U.S. at 609 n.25 (access rights meaningful only if press and public may be heard prior to exclusion); *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (court must provide notice on public docket of hearing to close proceedings).

Finally, the lower courts' handling of the case violates the established law of the Third Circuit itself, which has made clear that "to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest

and that there is no less restrictive way to serve that governmental interest." *Publicker Indus., Inc.*, 733 F.2d at 1070; *see also Cendent Corp. v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001) (invalidating confidentiality order where "the District Court failed to articulate the necessary findings to override the presumption of access when issuing the confidentiality order"); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3d Cir. 1995) ("[a]bsent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue").[5] But because the Petitioners were not even allowed to intervene to challenge the sealing, and therefore did not become "parties," it is unclear whether the Third Circuit was even able to entertain Petitioners' request for a rehearing *en banc*. *See* Fed. R. App. P. 35(b) (providing that a *party* may petition for rehearing *en banc*).

CONCLUSION

This case has been conducted for seven years in complete secrecy, a testament to the need for the Court's guidance regarding the right of access to civil hearings and records. The Court should grant review to clarify that the public has a constitutional right of access to civil proceedings and records, because civil proceedings implicate precisely the same concerns about the fairness of the justice system that underlie

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[5] *See also U.S. v. A.D.*, 28 F.3d 1353, 1356 (3d Cir. 1994) ("The First Amendment provides a right of public access in both civil and criminal cases"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) ("the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings").

the right of access to criminal proceedings. The Court should also clarify that the press and the public have a right to intervene for the limited purpose of challenging secret records and proceedings.

Moreover, review is warranted in order to correct the lower courts' abusive secrecy practices in a case of significant public interest. If the courts below had a compelling reason to close these proceedings, and were truly unable to devise less restrictive alternatives to total closure, they should be required to say so, and make public findings in support of this conclusion. And they should be required at least to entertain objections to such secrecy, rather than simply refuse a motion to intervene for the purpose of challenging the sealing. The failure below to meet these rudimentary obligations constitutes a drastic departure from usual and accepted judicial practice, and warrants intervention by this Court.

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APPENDIX A

Identification of *Amici Curiae*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ABC, Inc., alone or through its subsidiaries, owns and operates, *inter alia*, ABC News, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public, including WABC-TV, New York; KABC-TV, Los Angeles; WLS-TV, Chicago; WPVI-TV, Philadelphia; KTRK-TV, Houston; KGO-TV, San Francisco; WTVD-TV, Raleigh-Durham, N.C.; WJRT-TV, Flint, Michigan; WTVG-TV, Toledo, Ohio, and KFSN-TV, Fresno, Cal. ABC News produces news and public affairs programs – including "World News with Charles Gibson," "Nightline," "Good Morning America," and "20/20" – that are distributed over the ABC Television Network for broadcast nationwide by ABC owned and affiliated stations.

The Associated Press ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

The Association of Alternative Newsweeklies ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including

weekly papers like The Village Voice, Boston Phoenix and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 20 million readers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world. Bloomberg News supplies real time business, financial and legal news to more than 200,000 desktop subscribers world-wide. As a wire service, Bloomberg provides news to more than 400 newspapers in 63 countries with a combined circulation of 76.2 million readers. Bloomberg also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public interest. Bloomberg also publishes four monthly magazines. Its Bloomberg Press division publishes more

than 50 book titles each year, and its internet website www.bloomberg.com receives 3.5 million individual user visits each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. CBS Broadcasting owns and operates broadcast television stations nationwide, and, through its CBS News Division, produces morning, evening and weekend news programming, as well as magazine programs such as "60 Minutes" and "48 Hours."

Cox Newspapers, Inc. ("CNI") is a privately held Delaware corporation. CNI and its subsidiaries publish 16 daily and 26 non-daily newspapers. CNI is a wholly owned subsidiary of Cox Enterprises, Inc. ("CEI"), also a privately held Delaware corporation and publisher of the Atlanta Journal Constitution. The combined circulation of CEI and CNI newspapers is approximately two million. Both corporations' principal place of business is Atlanta, GA.

Daily News, L.P., publishes the New York *Daily News*, which is the fifth-largest circulation newspaper in the country, serving primarily the New York City metropolitan area.

Dow Jones & Company, Inc. publishes, *inter alia*, the Wall Street Journal, Barron's magazine and other periodicals. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E. W. Scripps Company (www.scripps.com) is a diverse, 130-year-old media enterprise with inter-

ests in television stations, newspapers, and licensing/syndication. The company's portfolio of locally focused media properties is comprised of: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 15 markets and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service; and United Media, the licensor and syndicator of Peanuts, Dilbert and approximately 150 other features and comics. Scripps businesses operate robust, interactive Web sites in all their local markets.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 85 daily newspapers in the United States, including USA TODAY, and nearly 900 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations and its U.S. websites attract nearly 26 million unique visitors a month.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly traded company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a not for profit trade association comprised of more than 240 domestic magazine publishers who collectively publish over 1,400 magazines. MPA members provide broad coverage of domestic and international news

and other matters of interest to the public. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the *Sacramento Bee*, the *Miami Herald*, the *Kansas City Star* and the *Charlotte Observer*. The newspapers have a combined average circulation of approximately 2,600,000 daily and 3,200,000 Sunday.

Established in 1885, the National Newspaper Association ("NNA") is the national voice of community newspapers. NNA represents owners, publishers, and editors of America's community newspapers and with over 2,500 newspaper members, is currently the largest newspaper association in the United States. The mission of the National Newspaper Association is to protect, promote and enhance America's community newspapers. NNA is headquartered in Columbia, Missouri.

National Public Radio, Inc. ("NPR") is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

NBC Universal, Inc. is one of the world's leading media and entertainment companies in the develop-

ment, production, and marketing of news, entertainment and information to a global audience. Among other businesses, NBC Universal owns and operates the NBC Television Network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of 26 owned-and-operated stations. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline," and "Meet the Press."

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of Amer-

ica. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

Newsweek, Inc. publishes the weekly news magazines *Newsweek* and *Newsweek International*, distributed nationally and internationally, respectively, Newsweek.com, and Arthur Frommer's Budget Travel magazine, distributed nationally, and BudgetTravel.com.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters America LLC ("Reuters") is an indirect wholly-owned subsidiary of Thomson Reuters PLC, which serves the global financial markets and news media with a wide range of information products and transactional solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Reuters is the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 196 bureaus around the world, serving 129 countries. Reuters has a significant interest in this matter as it relies on the rights protected by the

First Amendment in order to produce a comprehensive news file, seen by over 1 billion people every day.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with newspapers from North Carolina to Hawaii. Its flagship paper, the Las Vegas *Review-Journal*, is the largest newspaper in Nevada.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 130 magazines in the United States and abroad. Its major titles include Time, Fortune, Sports Illustrated, People, and Entertainment Weekly. Time Inc. is a subsidiary of Time Warner Inc.

Tribune Company, Inc. operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households. In publishing, Tribune operates nine daily newspapers, including the Chicago Tribune, the Los Angeles Times, Newsday, The (Baltimore) Sun, and the South Florida Sun-Sentinel. In broadcasting, Tribune owns 23 television stations and Superstation WGN on national cable. These publishing and broadcasting interests are complemented by high-traffic news and information web sites.

U.S. News & World Report, L.P. is a limited partnership, the general partner of which is U.S. News & World Report, Inc. The company publishes content in various media, including *U.S. News & World Report*, a national news magazine, and the website www.usnews.com.

The Washington Post is a leading newspaper with nationwide daily circulation of over 699,000 and a Sunday circulation of over 929,000.

APPENDIX B

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